Supreme Court, U.S.
FILED
JUN 8 - 2004
OFFICE OF THE CLERK

No. 03-1518

In The
Supreme Court of the United States

STEVEN CHORTEK, GREG HEITZ,
JERRY MASON, ET AL.,

Petitioners,

v.

CITY OF MILWAUKEE, ARTHUR L. JONES
AND CITY OF MILWAUKEE POLICE DEPARTMENT,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

In the context of detailing their "questions presented for review," petitioners state that their arrests "were made subject to a Milwaukee Police Departmental order . . . which required officers to arrest and take to jail anyone who was observed selling tickets." (Petition, p.i.) Petitioners also state that the "order and/or policy" "did not give the officers on the street discretion and required all individuals who were involved in minor, non-violent ordinance violations such as ticket selling to be arrested and jailed." (Petition, p.i.) These are misstatements of fact. The subject unlawful-ticket-selling initiative required Milwaukee police officers to summarily arrest any individual observed violating Milwaukee ordinances, which prohibited selling special event tickets either on public premises reserved for specific public purposes, or without a direct-sellers license. (See Milwaukee Code of Ordinances, secs. 105-56, Sales on Public Premises and 95-1, Direct Sellers, reproduced at pp. 1 to 3, infra.) Furthermore, arresting officers did have discretion regarding the arrest process, and could, for example, ticket and release pregnant women, or adults with small children.

In addition, petitioners' "questions presented for review" suggest issues which may not properly involve the jurisdiction of this court. The only issues maintained by the petitioners, through their appeal to the Seventh Circuit Court of Appeals, were: 1. the lawfulness of a police initiative which generally required that certain municipal ordinance violators be summarily arrested, as opposed to being ticketed and released at the scene of their arrests; and 2. the lawfulness of the manner and length of the

QUESTIONS PRESENTED FOR REVIEW – Continued

ordinance violators' detentions. Any other issue/question is not properly before this Court, including any challenge to the lawfulness of the decision to summarily arrest all ordinance violators, rather than a select few.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
ORDINANCES INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	3
A. Procedural Posture	3
B. Police Policy	7
C. Bradley Center Complaint and the Unlawful-Ticket-Selling Initiative	14
D. The Arrests	18
ARGUMENT	19
I. THE FACT THAT MILWAUKEE POLICE OFFICERS SUMMARILY ARRESTED UNLAWFUL TICKET SELLERS DURING THE COURSE OF THE SUBJECT UNLAWFUL-TICKET-SELLING INITIATIVE WAS NOT UNCONSTITUTIONAL, AND IT WAS NOT THE RESULT OF A POLICE POLICY, ACTIONABLE UNDER § 1983: THEREFORE, SUMMARY JUDGMENT WAS APPROPRIATE, AND CONSISTENT WITH APPLICABLE CASELAW RELATIVE TO THE *MONELL* CLAIM	19

TABLE OF CONTENTS – Continued

Page

II. THE UNLAWFUL TICKET SELLERS WERE ARRESTED AND PROCESSED LIKE ANY OTHER MUNICIPAL ORDINANCE VIOLATORS, AND THEY WERE DETAINED ONLY FOR THE TIME NECESSARY TO CONDUCT CERTAIN ADMINISTRATIVE STEPS INCIDENT TO THEIR ARRESTS: THEREFORE, THE SUBJECT ARRESTS DID NOT VIOLATE THE FOURTH AMENDMENT, AND SUMMARY JUDGMENT WAS APPROPRIATE AND CONSISTENT WITH APPLICABLE CASELAW 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Arlotta v. Bradley Center, et al., 349 F.3d 517 (7th Cir. 2003) 5, 6

Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) 22, 23, 27

Chortek, et al. v. City of Milwaukee, et al., 356 F.3d 740 (7th Cir. 2004) 5, 6

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) 21

Cornfield by Lewis v. Consolidated High School Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) 21, 22

County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) 24

Felton v. Board of Commissioners, 5 F.3d 198 (7th Cir. 1993) 22

Fiorenzo v. Nolan, 965 F.2d 348 (7th Cir. 1992) 21

Fletcher v. O'Donnell, 867 F.2d 791 (3d Cir. 1989), *cert. denied*, 492 U.S. 919, 109 S.Ct. 3244, 106 L.Ed.2d 591 (1989) 22

Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) 24

Grameros v. Jewel Companies, Inc., 797 F.2d 432 (7th Cir. 1986) 24

Henry v. Farmer City State Bank, 808 F.2d 1228 (7th Cir. 1986) 20

McGaughey v. City of Chicago, 664 F. Supp. 1131 (N.D. Ill. 1987) 24

TABLE OF AUTHORITIES – Continued

Page

McKee v. City of Rockwall, 877 F.2d 409 (5th Cir. 1989) 20

McNabola v. Chicago Transit Authority, 10 F.3d 501 (7th Cir. 1993) 20, 21

McNair v. Coffey, 279 F.3d 463 (7th Cir. 2002) 23

Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 6, 20, 21, 22

Moore v. The Marketplace Restaurant, 754 F.2d 1336 (7th Cir. 1985) 25

Morgan v. City of DeSoto, 900 F.2d 811 (5th Cir. 1990) 26, 27

Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) 20

Pembauer v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) 21, 22

Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) 27

Willis v. City of Chicago, 999 F.2d 284 (7th Cir. 1993) 24

Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993) 20

Woods v. City of Michigan City, Indiana, 940 F.2d 275 (7th Cir. 1991) 21

STATUTES

Milwaukee Code of Ordinance

§ 95-1 ..... i, 1, 15

§ 105-56 ..... i, 1, 15

TABLE OF AUTHORITIES – Continued

Page

Wis. Stats.

§ 66.0301 12

§ 165.83 12

§ 165.84 12

§ 302.336 12

§ 800.01 12

§ 800.01(1)(b) 11

§ 800.01(3) 11

ORDINANCES INVOLVED IN THE CASE

The key ordinances involved with this case are sections 95-1 and 105-56 of the Milwaukee Code of Ordinances. They provide as follows:

> **95-1 Direct Sellers.** 1. LICENSE REQUIRED. No direct seller may engage in direct sales on any public way or other public premises in this city without having obtained a license under this section.
>
> a. Stands, tables, containers or stationary apparatuses other than pushcarts may not be used to sell goods on the public way or other public premises in the central business districts as established under the zoning code.
>
> b. If goods are to be sold from a pushcart, stand, table, container or other stationary apparatus to be located on the public way or other public premises, the direct seller must also obtain a special privilege permit granted by common council resolution pursuant to s. 245-12. A special privilege permit related to sale of goods from a pushcart by a direct seller need be renewed annually only if the pushcart size and description submitted for annual renewal of the direct seller's permit has changed.
>
> **105-56 Sales on Public Premises.**
>
> 1. PURPOSE. It is determined and declared that the use of certain public premises for the specific public purposes to which such premises are intended is preeminent. It is further determined and declared that sales on the designated public premises interfere with their use for their intended purposes. It

is further determined and declared that the use of the public sidewalk and streets outside of the entrance to the Midwest Express Center, the Auditorium, the Arena, the Milwaukee public museum, the Bradley Center, the Performing Arts Center, the Eagle's Auditorium, the Riverside Theater, Summerfest, the circus grounds, as may be specified annually, on the day of the circus parade and the 3 days prior to the parade, and Miller Park parking facilities, for sales interferes with the orderly ingress and egress to and from those premises and therefore with their use for their intended purposes.

2. REGULATIONS. a. It shall be unlawful for any person to sell or offer for sale any goods, merchandise, foodstuffs, tickets or any other articles of any kind on public premises reserved for specific public purposes and posted as such without the express written consent of the custodian of such premises.

b. It shall be unlawful for any person to sell, or offer to sell, any goods, merchandise, foodstuffs, tickets or any other article of any kind on any public street or public sidewalk within 500 feet of the premises of the Midwest Express Center, the Auditorium, the Arena, the Milwaukee public museum, the Bradley Center, the Performing Arts Center, the Eagle's Auditorium, the Riverside Theater, Summerfest, the circus grounds, as may be specified annually, on the day of the circus parade and the 3 days prior to the parade, or Miller Park parking facilities, for the period of time beginning 2 hours immediately before the commencement of any

> scheduled event therein and ending one hour immediately after the conclusion of the event. This paragraph does not apply to any sales or offers to sell on the premises listed.
>
> PENALTY. Any person convicted of violating any provisions of this section shall be fined not less than $20 nor more than $200 for each violation plus costs of prosecution. Each day's violation shall constitute a separate offense.

STATEMENT OF THE CASE

A. Procedural Posture

Pursuant to their amended summons and complaint, which were filed with the district court on April 20, 2001, plaintiffs-appellants-petitioners Steven Chortek, Greg Heitz, Jerry Mason, Albert Collins, Jerry Sikora, Bradley Keenan, Troy Jensen, Kevin Perlberg, Michael Cullen, Steven Dwyer, Nicolas Imig, Luke Witte, James Klein, Thomas Wade and Justin Story were arrested on either January 23, January 27, January 31, February 2, February 13, February 19 or February 22, 2001, for unlawfully selling sporting-event tickets in the area of the Bradley Center sports facility, in downtown Milwaukee. (R.14, Amended Complaint, ¶¶ 24-30, 36.) They were each detained at the scene in a police conveyance wagon, and transported to the city jail. (Id., ¶¶ 24-31.) The plaintiffs-appellants-petitioners were each "booked," and detained for approximately nine hours, with the exception of Mr. Mason, who had an out-of-state driver's license, and who was detained for approximately twenty-one hours. (Id., ¶¶ 31-32.)

The above-listed plaintiffs-appellants-petitioners filed their amended summons and complaint with the district court on June 29, 2001. (R.14.) As against the City, Chief Jones and the Milwaukee Police Department, said plaintiffs-appellants-petitioners claimed that they were each 1) subjected to an unreasonable search and seizure, in violation of the Fourth and Fourteenth Amendments (Id., ¶ 40); 2) subjected to cruel and unusual punishment, under the Eighth and Fourteenth Amendments (Id.); 3) denied due process of law, and the equal protection of law, in violation of the Fourteenth Amendment (Id.); 4) denied their constitutional rights, due to "improper and negligent policies and procedures" of the MPD, which were "administered and supervised" by Chief Jones (Id., ¶ 37); and 5) that MPD and Bradley Center representatives "did combine and conspire" to subject the plaintiffs-appellants-petitioners to "abusive, excessive and unreasonable police conduct and jailing." (Id. ¶ 38).

The City of Milwaukee defendants-appellees-respondents filed answers to both the original complaint and the amended complaint, raising their defenses, including qualified immunity. (R.4, Answer; R.14, Answer to Amended Complaint.) The Bradley Center defendants settled the claims raised against them for the nominal sum of $750.00 per plaintiff-appellant-petitioner.

On April 2, 2002, the City of Milwaukee defendants-appellees-respondents filed their motion for summary judgment. (R.26.) The plaintiffs-appellants-petitioners filed a response to same, on or about June 7, 2002. (R.32.) On January 14, 2003, an order was signed by the district court, granting the motion for summary judgment, as to all issues raised by the plaintiffs-appellants-petitioners.

(R.40.) On February 6, 2003, the plaintiffs-appellants-petitioners filed their notice of appeal to the Seventh Circuit Court of Appeals. (R.42.)

The City of Milwaukee defendants-appellees-respondents respectfully note that a companion case was also decided by the district court. That case was captioned *Arlotta v. Milwaukee Bucks Inc., et al.*, Case No. 01-C-407, and involved a single unlawful ticket seller, Andrew Arlotta, and the same unlawful-ticket-selling initiative. The City of Milwaukee defendants-appellees-respondents brought a motion for summary judgment, relative to the *Arlotta* case as well. The district court granted the motion of the defendants-appellees-respondents, with regard to all claims raised by plaintiff Arlotta. Judgment was entered accordingly on February 5, 2003. The *Arlotta* case was also appealed.

In their appeal to the Seventh Circuit Court of Appeals, plaintiffs-appellants-petitioners only challenged the district court's judgment, with reference to 1) the lawfulness of the manner and length of their detention, and 2) the lawfulness of that aspect of the initiative which required each ordinance violator to be summarily arrested, as opposed to being ticketed and released at the scene of his arrest. The plaintiffs-appellants-petitioners did not challenge the fact of their arrests, or the fact that their activity violated the law, and gave their arresting officers probable cause for their arrests, or the fact that the subject initiative was designed so that all ordinance violators would be arrested, rather than a select few.

The Seventh Circuit decided the *Arlotta* case on November 18, 2003 (*Arlotta v. Bradley Center, et al.*, 349 F.3d 517 (7th Cir. 2003)) and the *Chortek* case on January

23, 2004 (*Chortek, et al. v. City of Milwaukee, et al.*, 356 F.3d 740 (7th Cir. 2004)). In *Arlotta,* the Seventh Circuit affirmed the dismissal of the *Monell* policy-related claim, by holding that, regardless of the lawfulness of the arrest, Mr. Arlotta "failed to establish sufficient causation between the City's policy and his arrest sufficient to sustain his § 1983 claim." (*Arlotta*, 349 F.3d at 523.) The Seventh Circuit also held that neither the one hour Mr. Arlotta was held on-scene in a conveyance vehicle, nor his hours spent at the police station, were unreasonable. (Id. at 523-524.) In fact, the court held that "Arlotta (and, it seems, the other arrestees) were kept in custody only as long as it took their processing officer to complete the steps necessary to finish the booking procedure." (Id.) Thus, the unlawful-detention issue was decided in favor of the City defendants-appellees-respondents as well.

In *Chortek*, the Seventh Circuit held that the subject "arrests may have been 'humiliating,' but they were no more harmful 'than the normal custodial arrest'" (*Chortek*, 356 F.3d 746), and that "the length of the plaintiffs' detentions was not constitutionally unreasonable given the natural backlog in processing at PPS." (*Chortek*, 356 F.3d 748). Thus, the court affirmed summary judgment on the manner and length-of-detention issues. With reference to the *Monell* issue, the court held that, because the police chief was the official policy-maker for the police department, and he was not involved with developing the subject unlawful-ticket-selling initiative, the plaintiffs-appellants-petitioners could not establish a municipal policy, actionable under § 1983. (Id. at 749-750.) Plaintiffs-appellants-petitioners filed their Petition for a Writ of Certiorari with this Court on or about April 22, 2004, and it was placed on the docket on May 10, 2004.

B. Police Policy

The record presents this Court with a full description of Milwaukee Police Department policies relative to processing arrested persons. Persons who are taken into custody by Milwaukee District One police officers are processed at the main jail facility located in the Police Administration Building at 749 W. State Street. Prisoners are escorted by the arresting or conveying officer to the fifth floor of the building to the Prisoner Processing Section (PPS) for processing. The prisoners are lined-up along the wall, and wait their turn to be "booked" by the booking officer. Depending on the number of people already in line, the waiting time can be 15 minutes to 1½ hours. "Booking" is the administrative step taken after an arrested person is brought into a police station, and consists of entering the accused's name and charges against him in a police blotter, along with other relevant facts. It also entails a thorough search of the individual, an inventory of property items and evidence, and completion of a medical questionnaire. (R.27, Ex. B: Riojas Aff., ¶ 5.) (The Riojas Affidavit is included in the appendix to respondents' appellate brief as Ap. App. pp. 121-138.)

Prior to reaching the booking room, the prisoner's personal-identification information and the charges against him are handwritten in the booking blotter and later entered into the booking database. An order-for-detention slip is also prepared at this time by the arresting or conveying officer, which is time-stamped when the prisoner enters the booking room. Copies of the orders for detention prepared by the arresting officers relative to this matter are included in the summary judgment appendix at appendix pages SC 11, GH 11, JM 11, AC 13, JS 11, BK 11, TJ 11, KP 11, MC 11, SD 12, NI 11, LW 11, JK 12, TW 11

and JCS 10. (R.27, Ex. B: Riojas Aff., ¶ 6; Ap. App. pp. 121-138.) They are also included in the appendix to respondents' appellate brief as Ap. App. pp. 139-154.

When the prisoner reaches the booking room, the prisoner's outer garments are removed and he is searched for any contraband or items that could cause him or others harm. Items such as shoestrings and ties are removed and bagged with the clothing. Contraband items are itemized on an evidence report. (R.27, Ex. B: Riojas Aff., ¶ 7; Ap. App. pp. 121-138.)

All of the property of the prisoner is removed, laid on a table and inventoried. Any money is inventoried and separately placed in a safe. The prisoner receives a copy of the property-register report itemizing all of the property that has been taken from him. The property-inventory number and the evidence-inventory number are cross-referenced on the arrest-and-detention report at this time. Copies of the property-register reports prepared by the police officers relative to this matter are included in the summary judgment appendix at appendix pages SC 3, GH 3, JM 3, AC 3-5, JS 3, BK 3, TJ 3, KP 3, MC 3, SD 4, NI 3, LW 3, JK 3-4, TW 3 and JCS 3. (R.27, Ex. B: Riojas Aff., ¶ 8; Ap. App. pp. 121-138.)

The prisoner is also questioned about his medical history and a medical-intake-screening report is prepared, noting any medical or mental conditions of which the police should be aware. Copies of the medical-intake-screening reports completed by the police officers relative to this matter are included in the summary judgment appendix at appendix pages SC 4, GH 4, JM 4, AC 6, JS 4, BK 4, TJ 4, KP 4, MC 4, SD 5, NI 4, LW 4, JK 5, TW 4 and JCS 4. (R.27, Ex. B: Riojas Aff., ¶ 9; Ap. App. pp. 121-138.)

After the booking procedure is completed, the prisoner is escorted to the holding area and placed in the appropriate gender-specific holding cell or "bullpen." The reports and order for detention are given to the PPS sergeant, which he uses to keep track of who is in the holding area. If the arresting officer is not the person who escorts the prisoner to the holding area, the arrest-and-detention report remains with the PPS sergeant, to be picked-up later by the arresting officer for completion. If the arresting officer is the person who escorts the prisoner to the holding area, he takes the arrest-and-detention report with him to complete. (R.27, Ex. B: Riojas Aff., ¶ 10; Ap. App. pp. 121-138.)

After the prisoner has been placed in the bullpen, the arresting officer requests a "wanted" package, which consists of computer teletypes listing any local wants, extended state and national wants, and the person's criminal record. Any positive "hits" for outstanding warrants must be verified. Milwaukee Police Department civilians in the bureau of identification prepare the wanted packages on a first-come-first-serve basis, however "priority" requests can supercede other requests. The length of time officers must wait to receive a wanted package depends on the number of prior requests already in the works. Frequently to save time, officers will telephone their request for a wanted package while they are in the booking room. Once the officer receives his package, he can complete the arrest-and-detention report and citation. (R.27, Ex. B: Riojas Aff., ¶ 11; Ap. App. pp. 121-138.)

Copies of the arrest-and-detention reports prepared by the police officers relative to this matter are included in the summary judgment appendix at appendix pages

SC 1-2, GH 1-2, JM 1-2, AC 1-2, JS 1-2, BK 1-2, TJ 1-2, KP 1-2, MC 1-2, SD 1-3, NI 1-2, LW 1-2, JK 1-2, TW 1-2 and JSC 1-2. (R.27, Ex. B: Riojas Aff., ¶ 12; Ap. App. pp. 121-138.) Information included on an arrest-and-detention report is the date and time of arrest, the names of the officers involved in the arrest, the nature and description of the offense, personal data and identification information regarding the subject, and the method and time of conveyance. Other information included on the arrest-and-detention report is the time at which the record and outstanding warrant check or "wanted package" is completed, a cross-reference to both the inmate-property register and the evidence inventory, and the name of the complainant. (R.27, Ex. B: Riojas Aff., ¶ 13; Ap. App. pp. 121-138.)

Copies of the citations prepared by the police officers relative to this matter are included in the summary judgment appendix at appendix pages SC 5-10, GH 5-10, JM 5-10, AC 7-12, JS 5-10, BK 5-10, TJ 5-10, KP 5-10, MC 5-10, SD 6-11, NI 5-10, LW 5-10, JK 6-11, TW 5-10 and JSC 5-9. (R.27, Ex. B: Riojas Aff., ¶ 14; Ap. App. pp. 121-138.) Some of the information included on the citations is the personal data regarding the offenders, the date and time of the alleged municipal violation, the ordinance or statute violated, the location where the alleged violation occurred, and the date of the offender's initial court appearance. (R.27, Ex. B: Riojas Aff., ¶ 15; Ap. App. pp. 121-138.) Upon completing the arrest-and-detention report and citation(s), the officer hand-delivers all of the paperwork generated by the arrest (except for the order of detention and medical-intake report) to the shift commander for his review and signature. (R.27, Ex. B: Riojas Aff., ¶ 16; Ap. App. pp. 121-138.)

Once the shift commander has signed-off on the paperwork, it is hand-carried to the PPS sergeant and an order for release is prepared by the arresting officer. The prisoner is taken out of the bullpen, and the citation(s) and procedure to contest same are explained to the prisoner. The prisoner is then requested to fingerprint the back of the citation(s) with his index finger, and sign the citation(s). The prisoner is then returned to the bullpen. (R.27, Ex. B: Riojas Aff., ¶ 17; Ap. App. pp. 121-138.)

The executed and fingerprinted citation is brought back to the PPS sergeant, who reviews all of the paperwork regarding the prisoner. If the paperwork is in order, the PPS sergeant assigns an officer to escort the prisoner from the bullpen to the property room, where the prisoner signs for his property and receives his belongings. If the prisoner is released after normal business hours, he is then escorted out of the building by the officer. The order for release is time-stamped when the prisoner leaves the fifth floor, where the PPS is located. Copies of the orders for release prepared by the arresting officers relative to this matter are included in the summary judgment appendix at appendix pages SC 11, GH 11, JM 11, AC 13, JS 11, BK 11, TJ 11, KP 11, MC 11, SD 12, NI 11, LW 11, JK 12, TW 11 and JCS 10. (R.27, Ex. B: Riojas Aff., ¶ 18; Ap. App. pp. 121-138.) They are also included in the appendix to respondents' appellate brief as Ap. App. pp. 139-154.

Non-resident persons, who are issued municipal citations and cannot post cash bail, must be processed at the Milwaukee County Criminal Justice Facility, in accordance with the intergovernmental cooperation agreement between the Milwaukee Police Department and the County of Milwaukee, and pursuant to §§ 800.01(1)(b) and 800.01(3) Wis. Stats. Attached to the Riojas Affidavit

at appendix pages FR 1-3 are S.O.P. sections 3/150.60 and 3/075.10 of the Milwaukee Police Department Rules and Procedures, relative to this agreement. Also attached to the Riojas Affidavit at appendix pages FR 4-8, are copies of the applicable state statutes: §§ 800.01, 302.336, 66.0301, 165.83 and 165.84 Wis. Stats. (R.27, Ex. B: Riojas Aff., ¶ 19, FR 1-8; Ap. App. pp. 121-138.)

Arrest-and-detention reports, medical-screening reports, property registers and evidence-inventory reports are all documents prepared and maintained by the Milwaukee Police Department in the regular course of business operations. (R.27, Ex. B: Riojas Aff., ¶ 20; Ap. App. pp. 121-138.) Citations are issued and prepared by Milwaukee police officers in the regular course of business, and are filed with the Milwaukee Municipal Court as part of the official court record. (R.27, Ex. B: Riojas Aff., ¶ 21; Ap. App. pp. 121-138.)

Monthly and yearly statistical reports are prepared by PPS personnel regarding the number of prisoners processed through the PPS. Such reports are attached to the Riojas Affidavit at appendix pages FR 9-11. (R.27, Ex. B: Riojas Aff., ¶ 22, FR 9-11; Ap. App. pp. 121-138.) During the month of January 2001, 1,653 prisoners were processed through the PPS. In the month of February 2001, 1,334 prisoners were processed. On the subject dates of arrest relative to this matter: 65 prisoners were processed on 1/23/01, of which at least 5 individuals were arrested for ticket-scalping; 37 prisoners were processed on 1/27/01, of which at least 6 individuals were arrested for ticket-scalping; 88 prisoners were processed on 1/31/01, of which at least 8 individuals were arrested for ticket-scalping; 42 prisoners were processed on 2/02/01, of which at least 3 individuals were arrested for ticket-scalping; 54 prisoners

were processed on 2/13/01, of which at least 8 individuals were arrested for ticket-scalping; 52 prisoners were processed on 2/19/01, of which at least 8 individuals were arrested for ticket-scalping; and, 61 prisoners were processed on 2/22/01, of which at least 2 individuals were arrested for ticket-scalping. (R.27, Ex. B: Riojas Aff., ¶ 23; Ap. App. pp. 121-138.)

It was and is the policy of the Milwaukee Police Department that officers may arrest subjects relative to a municipal ordinance violation. (R.27, Ex. E: Jones depo., p. 13.) Furthermore, Milwaukee Police Department supervisors have the authority to use their discretion to modify arrest-related policy as the situation may dictate. (R.27, Ex. E: Jones depo., pp. 23-27.) The Milwaukee Police Department policy regarding the length of time a prisoner may be held in custody for processing, relative to an ordinance violation is, depending on the circumstances, whatever time is reasonable; there is no specific timeframe set by policy. (R.27, Ex. E: Jones depo., pp. 27-28.) The period of time a prisoner is held in the holding cell depends upon how crowded the PPS is and how many arrests that the arresting officer is in charge of, among other things. (R.27, Ex. K: Wroblewski depo., p. 18.)

Police district number one encompasses the downtown area of the City of Milwaukee, and anyone arrested within its boundaries is processed through the PPS. (R.27, Ex. B: Riojas Aff., ¶ 24; Ap. App. pp. 121-138.) The time of day when PPS is the busiest, and is processing the most prisoners, is late evening to early morning. (R.27, Ex. B: Riojas Aff., ¶ 25; Ap. App. pp. 121-138.) When groups of arrestees are brought into the PPS for processing, it creates a backlog at the PPS. (R.27, Ex. B: Riojas Aff., ¶ 26; Ap. App. pp. 121-138.)

C. Bradley Center Complaint and the Unlawful-Ticket-Selling Initiative

As early as the summer of 2000, Bradley Center officials were discussing the annoyance, harassment and fright experienced by patrons as they entered the building, due to individuals who were attempting to sell event tickets, and the fact that said officials were "interested in just cleaning up the front door a little bit." (R.27, Ex. M, Steinmiller depo., pp. 5-9.) Representatives from the Bradley Center met with Milwaukee Police Department personnel in January, 2001, and explained that the Bradley Center was experiencing problems associated with ticket scalpers aggressively harassing fans as they were coming to the Bradley Center. (R.27, Ex. F: Edman depo., pp. 7-8; R.27, Ex. O: Harrell depo., pp. 10-12; R.27, Ex. N: Bartlett depo., pp. 19-21, 24-26; R.27, Ex. L: Buetow depo., pp. 4-5, 30.) Bradley Center representatives tried to handle the problem on their own, but both the representatives and the security people they hired had their lives threatened by the scalpers. (R.27, Ex. N: Bartlett depo., pp. 17-18; 53-55.) They were also finding that the number of regular ticket scalpers was increasing. (R.27, Ex. N: Bartlett depo., pp. 17-18.)

Police department personnel informed Bradley Center representatives that Milwaukee Police Department officers could assist them in resolving their problems by effecting arrests. (R.27, Ex. F: Edman depo., p. 10.) Bradley Center representatives were aware that police vehicles, to be used for the transportation of arrestees, would be placed on Bradley Center property on certain nights. (R.27, Ex. F: Edman depo., pp. 32-33.) Bradley Center representatives were also told that people would be

brought to the police station as part of the unlawful-ticket-selling initiative. (R.27, Ex. F: Edman depo., p. 35.) Bradley Center representatives indicated that they would support the police department with this initiative. (R.27, Ex. F: Edman depo., pp. 10-11, 35.)

Police department personnel reviewed the Bradley Center problem with the Chief Prosecutor for the Milwaukee City Attorney's Office, who agreed that the above-noted ordinances, Sections 95-1 and 105-56, were appropriate for application in the initiative. (R.27, Ex. F: Edman depo., pp. 12, 17-23.) The initiative began within days of the initial meeting between Milwaukee Police Department and Bradley Center representatives. (R.27, Ex. F: Edman depo., p. 52.)

Lt. Edman, who was the primary planner of the initiative, noted that Milwaukee Police Department intelligence had learned that there were some very sophisticated ticket scalpers. Some would work in pairs or threes, and they would even arrange the sale of tickets, and then leave to go to another location to obtain the tickets, so as to not be found with tickets on their persons. (R.27, Ex. F: Edman depo., pp. 68-69.) The police department had previously issued tickets to scalpers, and released them on scene, but that method proved to be ineffective, because once released, the ticket scalpers would continue to engage in scalping tickets and harassing fans coming into the Bradley Center, so police officials decided on more aggressive action regarding ticket scalpers in the subject initiative. (R.27, Ex. F: Edman depo., pp. 36-38; R.27, Ex. L: Buetow depo., pp. 33, 49-50.) It was the decision of Lt. Edman to summarily arrest people who violated the subject ordinances. (R.27, Ex. F: Edman depo., p. 48.) Chief Jones was unaware of the initiative until

after it was underway, when a news reporter contacted him regarding it. (R.27, Ex. E: Jones depo., pp. 4-7.)

It was also Lt. Edman's decision that individuals arrested for unlawful ticket selling would be taken to the prisoner processing section of the Milwaukee Police Department. (R.27, Ex. F: Edman depo., p. 48.) Lt. Edman noted that a supervisor was on scene, during the initiative, who would determine if there were any cases which gave cause for deviation from this aspect of the initiative plan. (R.27, Ex. F: Edman depo., p. 51.) Milwaukee Police Department policy allowed Lt. Edman the discretion to have the violators summarily arrested. (R.27, Ex. F: Edman depo., pp. 53-54.) According to Lt. Edman, any violation of any City of Milwaukee Ordinance could be subject for summary arrest. (R.27, Ex. F: Edman depo., pp. 53-54.) The initiative addressed all violators, not just habitual ticket scalpers. (R.27, Ex. F: Edman depo., p. 39; R.27, Ex. L: Buetow depo., pp. 20-21.) According to Lt. Edman, police department representatives "came up with a plan and [they] applied it equally to all violators that [they] could observe, detect, and apprehend." (R.27, Ex. F: Edman depo., p. 42.) Furthermore, Lt. Edman noted that police department representatives "applied the ordinance equally to all that [they] could identify as violating the city ordinances and treated everybody the same." (R.27, Ex. F: Edman depo., p. 44.)

When police-district staffing would allow, there would be one plainclothes officer, two uniformed officers and one conveyance officer assigned to the initiative. Four was the minimum staff, but if possible, an additional two uniformed officers would be added, for a total of six officers assigned to the initiative. (R.27, Ex. J: Keen depo., pp. 15-16.) Officers assigned to the initiative on a particular

evening would arrive approximately an hour before the start of a scheduled event, and they would stay until one-half hour after the event started. (R.27, Ex. H: Chin depo., pp. 7-9.) The plainclothes officer would observe the activities which constituted an ordinance violation, and he would call the uniformed officers, using a cell phone, and the uniformed officers would effect the arrest. (R.27, Ex. H: Chin depo., pp. 10-13, 79.) The unlawful ticket sellers were placed in a police vehicle, and when the initiative came to an end for the evening, usually after the sporting event began, the prisoners were taken to the PPS, and were booked, cited and released. (R.27, Ex. J: Keen depo., pp. 9-10; R.27, Ex. H: Chin depo., pp. 55-56.)

The unlawful ticket sellers were treated like everyone else processed through the PPS. (R.27, Ex. K: Wroblewski depo., p. 6.) Some nights, more than one conveying vehicle would be used, because they would be filled. (R.27, Ex. H: Chin depo., p. 57.) The officers assigned to the initiative would follow any arrestees to the PPS, and would assist in whatever work was necessary to expedite the release of the prisoners. (R.27, Ex. H: Chin depo., pp. 14, 41.)

The processing of the prisoners was tedious work, and varying circumstances, like how crowded the PPS was and how many arrestees the arresting officer was in charge of, would affect the speed of prisoner processing. (R.27, Ex. H: Chin depo., pp. 69-70; R.27, Ex. I: Ruege depo., pp. 31-37; R.27, Ex. K: Wroblewski depo., p. 18.) Aside from taking some time to eat dinner, officers worked continuously on processing prisoners throughout the night, until the prisoners were released. (R.27, Ex. H: Chin depo., p. 77; R.27, Ex. I: Ruege depo., p. 37.) The processing procedure could easily take six, seven or eight hours. (R.27, Ex. I: Ruege depo., p. 33.) Officers stayed and put in overtime to

complete the processing. (R.27, Ex. I: Ruege depo., p. 33.) Individuals arrested pursuant to the subject initiative were processed consistent with standard police procedure, as outlined in Section B, above. (*See* generally, R.27, Ex. G: Belmore depo.)

Supervisory personnel, who were assigned to the PPS during nights involved with the initiative, would regularly check to see that officers were working on completing the paperwork necessary to begin the process of releasing those arrested. (R.27, Ex. G: Belmore depo., pp. 20-25; R.27, Ex. K: Wroblewski depo., pp. 4-5, 25.) Arrestees would be released as soon as their paperwork was completed. (R.27, Ex. H: Chin depo., p. 67.)

An additional part of the initiative plan was that the people arrested were told by a Bradley Center representative that they were not welcome to come back to the Bradley Center, and that they would be charged with trespassing if they did come back. (R.27, Ex. F: Edman depo., p. 30; R.27, Ex. O: Harrell depo., pp. 17-18.) Ultimately, police department representatives were planning on going to the District Attorney's Office, to get restraining orders relative to the people who were found to habitually violate the unlawful-ticket-selling ordinances. (R.27, Ex. F: Edman depo., p. 47.)

D. The Arrests

It is undisputed that each and every one of the plaintiffs-appellants-petitioners in this case was arrested for selling, or attempting to sell, sporting-event tickets, in the area of the Bradley Center, and in violation of the Milwaukee Code of Ordinances. It is also undisputed that each and every one of the plaintiffs-appellants-petitioners

was detained and processed through the Milwaukee city jail like any other municipal-ordinance violator. Therefore, recitation of the specific facts, relative to the particulars of the arrest and detention of each plaintiff-appellant-petitioner, is not necessary for purposes of this Brief in Opposition.

ARGUMENT

Petitioners have presented no compelling reason for this Court to grant their Petition for a Writ of Certiorari. The facts of this case do not call for an exercise of this Court's supervisory power, because any lower court proceedings did not depart from the accepted and usual course of judicial proceedings. Furthermore, the decision of the Seventh Circuit Court of Appeals is not in conflict with the decisions of any other Circuit Court of Appeals, or of any state court of last resort. Finally, the questions of federal law involved do not need to be settled by the Supreme Court, because they already have been addressed by the Court's prior decisions.

I. THE FACT THAT MILWAUKEE POLICE OFFICERS SUMMARILY ARRESTED UNLAWFUL TICKET SELLERS DURING THE COURSE OF THE SUBJECT UNLAWFUL-TICKET-SELLING INITIATIVE WAS NOT UNCONSTITUTIONAL, AND IT WAS NOT THE RESULT OF A POLICY, ACTIONABLE UNDER § 1983: THEREFORE, SUMMARY JUDGMENT WAS APPROPRIATE AND CONSISTENT WITH APPLICABLE CASELAW, RELATIVE TO THE *MONELL* CLAIM

The plaintiffs-appellants-petitioners stubbornly continue to assert that it is unlawful for police officers to

arrest a subject and take him into custody, regarding an alleged minor offense punishable only by a fine, and therefore that the City maintained an unconstitutional arrest policy during the subject unlawful-ticket-selling initiative. The decisions of this Court have clearly established that to state a § 1983 claim against a municipality, the complaint must allege that the constitutional deprivation was caused by an official municipal policy, custom, or practice. *Oklahoma City v. Tuttle*, 471 U.S. 808, 810, 105 S.Ct. 2427, 2429, 85 L.Ed.2d 791, 796 (1985); *Monell v. Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611, 638 (1978); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1237 (7th Cir. 1986). "To establish a municipal policy or custom, the plaintiff must allege a specific pattern or series of incidents that support the general allegation of a custom or policy." *Henry*, 808 F.2d at 1237. A single incident, when unaccompanied by supporting history, does not provide an adequate basis for inferring a policy. *McKee v. City of Rockwall*, 877 F.2d 409, 415-16 (5th Cir. 1989). Furthermore, "[i]t is the plaintiff's difficult burden to establish the municipality's imprimatur on the unconstitutional conduct, . . . [and] he may attempt to meet that burden by looking to 'the official pronouncements of (the) municipal or legislative bod(y), actions by individuals with final decision-making authority, inaction or custom.' Moreover, the plaintiff must show a 'direct causal link between the municipal policy and the constitutional deprivation.'" *McNabola v. Chicago Transit Authority*, 10 F.3d 501, 509-10 (7th Cir. 1993). "[F]ailing to eliminate a practice cannot be equated to approving it." *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993) (cert. den., 511 U.S. 1088, 114 S.Ct. 1844, 128 L.Ed.2d 470 (1994).)

Recovery from a municipal entity is "limited to acts that are, properly speaking, acts 'of the municipality' – that is, acts which the municipality has officially sanctioned or ordered." *Pembauer v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986); *see also Fiorenzo v. Nolan*, 965 F.2d 348, 350 (7th Cir. 1992). It is the plaintiff's burden to establish the municipality's imprimatur on the unconstitutional conduct. *McNabola*, 10 F.3d at 509. The plaintiff may attempt to meet that burden by looking to "the official pronouncements of [the] municipality or legislative bod[y], agency action in accordance with delegated authority, actions by individuals with final decision making authority, inaction or custom." *Cornfield by Lewis v. Consolidated High School Dist. No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993).

The decisions of an employee without authority to set official policy provide an insufficient basis for the imposition of liability against the governmental entity under section 1983. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988); *Pembaur*, 475 U.S. at 483, 106 S.Ct. at 1300. "Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481, 106 S.Ct. at 1299; *see also Fiorenzo*, 965 F.2d at 350; *Woods v. City of Michigan City, Indiana*, 940 F.2d 275, 278 (7th Cir. 1991). Courts must look to state law in ascertaining the identity of policy-making officials. *City of St. Louis v. Praprotnik*, 485 U.S. 112 at 124-125, 108 S.Ct. 915 at 924-925, 99 L.Ed.2d 107 (1988); *McNabola*, 10 F.3d at 510; *Cornfield*, 991 F.2d at 1325; *Fiorenzo*, 965 F.2d at 350.

In the absence of a formal policy, plaintiffs-appellants-petitioners must rely on *Monell's* custom or practice prong

to establish a basis for municipal liability. *Monell* authorizes the imposition of liability against a municipal entity "for constitutional deprivations visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision making channels." 436 U.S. at 690-91, 98 S.Ct. at 2036; *see also Pembaur*, 475 U.S. at 484 n. 10, 106 S.Ct. at 1300 n. 10. The Seventh Circuit explained in *Cornfield* that "a practice of unconstitutional conduct, although lacking formal approval, may provide a basis for municipal liability" if the plaintiff can establish that the policy-making authority acquiesced in a pattern of unconstitutional conduct. 991 F.2d at 1326; *see also Felton v. Board of Commissioners*, 5 F.3d 198, 203 (7th Cir. 1993). A municipal "custom" may be established by proof of the knowledge of policy-making officials and their acquiescence in the established practice. *See Fletcher v. O'Donnell*, 867 F.2d 791, 793-794 (3d Cir. 1989), *cert. den.*, 492 U.S. 919, 109 S.Ct. 3244, 106 L.Ed.2d 591 (1989).

As determined by the Seventh Circuit Court of Appeals, neither the decision to summarily arrest all offenders, nor the length of petitioners' detentions during prisoner processing, suffice to establish municipal liability, as the police chief, who was the chief policy maker for the police department, was not involved in planning any aspect of the subject initiative. Thus, there was no formal, municipal policy, which was actionable pursuant to § 1983. This decision was consistent with Seventh Circuit caselaw and the decisions of other Circuit Courts of Appeal. Furthermore, the case at hand was initially filed before *Atwater v. City of Lago Vista* (532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001)) was decided. However, in *Atwater*, this Court made it clear that it is not unlawful to

summarily arrest a subject for a minor offense, punishable only by a fine, and that subsequent detentions are lawful, as long as they are for such a length of time as is necessary to complete the administrative steps incident to arrest. Thus, the decision of the Seventh Circuit was consistent with the law as already determined by prior decisions of this Court. (*See also McNair v. Coffey*, 279 F.3d 463, 466 (7th Cir. 2002).)

II. THE UNLAWFUL TICKET SELLERS WERE ARRESTED AND PROCESSED LIKE ANY OTHER MUNICIPAL ORDINANCE VIOLATORS, AND THEY WERE DETAINED ONLY FOR THE TIME NECESSARY TO CONDUCT CERTAIN ADMINISTRATIVE STEPS INCIDENT TO THEIR ARRESTS: THEREFORE, THE SUBJECT ARRESTS DID NOT VIOLATE THE FOURTH AMENDMENT, AND SUMMARY JUDGMENT WAS APPROPRIATE AND CONSISTENT WITH APPLICABLE CASELAW

This Court has held that the standard from which to review the arrests and detentions of the arrested ordinance violators is whether they were conducted in an extraordinary manner, unusually harmful to the plaintiffs-appellants-petitioners' privacy or physical interests. *Atwater*, 121 S.Ct. at 1556-57. The City defendants-appellees-respondents respectfully assert that the arrested violators might have been inconvenienced and embarrassed by their arrests and subsequent booking, but the circumstances were not so extraordinary as to violate the Fourth Amendment. Much like Gail Atwater, the unlawful ticket sellers were handcuffed, placed in a police vehicle and taken to the local police station, where they had their personal property removed,

and were searched, placed in a holding cell, cited and released.

Furthermore, the unlawful ticket sellers were maintained in custody only as long as it took their processing officer(s) to complete the administrative steps incident to arrest. (R.26, PPFOF E33; R.27, Ex. G: Belmore depo; R.26, PPFOF E34; R.27, Ex. G: Belmore depo., pp. 20-25; R.27, Ex. K: Wroblewski depo., pp. 4-5, 25; R.26, PPFOF E35; R.27, Ex. H: Chin depo., p. 67.) Such a period of detention is lawful. (*See Gerstein v. Pugh*, 420 U.S. 103, 113-114, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975).) While the Fourth Amendment requires a prompt judicial determination of probable cause before an arrestee may be subjected to extended pretrial detention (*Gerstein*, 95 S.Ct. at 863; *Willis v. City of Chicago*, 999 F.2d 284, 287 (7th Cir. 1993)), courts have recognized that the regular problems confronting police when processing arrestees through the overcrowded criminal justice system may give rise to delays that are not deemed to violate the Fourth Amendment. (*County of Riverside v. McLaughlin*, 500 U.S. 44, 55, 111 S.Ct. 1661, 1669, 114 L.Ed.2d 49 (1991); *Willis*, 999 F.2d at 287.) Some unavoidable delays, like "'transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, [and] obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest' are all examples of situations in which delays in presentment are reasonable." *Willis* at 288 (citation omitted).

"The Seventh Circuit has twice decided that a four-year hour post-arrest detention without an appearance before a magistrate requires 'an explanation' from the government." *McGaughey v. City of Chicago*, 664 F. Supp. 1131, 1141-1142 (N.D. Ill. 1987), citing *Grameros v. Jewel*

Companies, Inc., 797 F.2d 432, 437 (7th Cir. 1986) and *Moore v. The Marketplace Restaurant*, 754 F.2d 1336, 1350-1352 (7th Cir. 1985). To satisfy this burden, the City defendants-appellees-respondents established that the City of Milwaukee is the largest metropolitan area in the State of Wisconsin. Also, police district number one is the district which encompasses the downtown area of the city. (R.26, PPFOF D24; R.27, Ex. B: Riojas Aff., ¶ 24; Ap. App. pp. 121-138.) Anyone arrested within the boundaries of this district are processed through the PPS. (R.26, PPFOF D1; R.27, Ex. B: Riojas Aff., ¶ 5; Ap. App. pp. 121-138.) Also, the time when the PPS is the busiest is late evening to early morning. (R. 26, PPFOF D25; R.27, Ex. B: Riojas Aff., ¶ 25; Ap. App. pp. 121-138.) Furthermore, when big groups of people are arrested, it causes a backlog at the PPS. (R.26, PPFOF D26; R.27, Ex. B: Riojas Aff., ¶ 26; Ap. App. pp. 121-138.)

As discussed above, each person arrested for violating the subject ordinances was booked, searched and placed in a bullpen, while officers completed their reports, just as with any other arrestee. Each arrested ordinance violator had to be individually walked through the booking process by an officer. Each arrestee had to complete a medical screening process and be searched. Each processing officer was responsible for filling out the various reports on each arrestee. Wanted packages had to be processed for each arrestee, to determine if they were wanted for other crimes. PPS supervisors monitored the progress of the arrest processing, and regularly checked on same. (R.26, PPFOF E34; R.27, Ex. G: Belmore depo., pp. 20-25; R.27, Ex. K: Wroblewski depo., pp. 4-5, 25.) The arresting and/or processing officers processed the tedious

paperwork as quickly as they could, given varying circumstances, including the number of people being processed at the PPS and the number of arrestees the officers were responsible for. (R.26, PPFOF E28; R.27, Ex. H: Chin depo., pp. 14, 41; R.26, PPFOF E29; R.27, Ex. H: Chin depo., pp. 69-70; R.27, Ex. I: Ruege depo., pp. 31-37; R.27, Ex. K: Wroblewski depo., p. 18; R.26, PPFOF E30; R.27, Ex. H: Chin depo., pp. 77; R.27, Ex. I: Ruege depo., p. 37; R.26, PPFOF E31; R.27, Ex. I: Ruege depo., p. 33; R.26, PPFOF E32; R.27, EX. I: Ruege depo., p. 33; R.26, PPFOF E33, *see generally*, R.27, Ex. G: Belmore depo.; R.26, PPFOF E35; R.27, Ex. H: Chin depo., p. 67.) All administrative steps applied to all arrestees, and the documents created were/are used to record the circumstances surrounding each detention, and to ensure that each detention is safe. The Seventh Circuit Court of Appeals held that the detention times were no longer than was necessary to complete the administrative steps incident to arrest, and that they thus survived Fourth Amendment scrutiny. This holding regarding the Fourth Amendment issue was consistent with caselaw generated by the Seventh Circuit, other Circuit Courts of Appeal and the United States Supreme Court.

The plaintiffs-appellants-petitioners argue that the *Morgan* case (*Morgan v. City of DeSoto*, 900 F.2d 811 (5th Cir. 1990)) supports a split in the Circuit Courts, and that said case undermines the reasonableness of the decision to summarily arrest any individuals taken into custody, relative to the unlawful-ticket-selling initiative. However, *Morgan* was decided many years prior to this Court's decision in *Atwater*. Also, *Morgan* involves the reasonableness of the arrest of teenagers, due to the fact of their presence in a parking lot. The teens were not necessarily

arrested because they were observed by law enforcement officers to be committing any violation of the law. With reference to the case at hand, only adult individuals who were observed on Bradley Center premises, engaging in activities which violated certain municipal ordinances, were arrested. Thus, *Morgan* does not apply to the case at hand, and it certainly does not support any assertion that applicable decisions of the Circuit Courts of Appeal are in conflict. On that same note, *Welsh v. Wisconsin* (466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d (1984)), does not apply, as it was also decided many years before *Atwater*, and it relates to the warrantless entry by police into a person's home, without exigent circumstances.

CONCLUSION

Petitioners have failed to present this Court with any basis for granting their Petition for a Writ of Certiorari. Respondents City of Milwaukee, Arthur L. Jones and the City of Milwaukee Police Department respectfully assert that said petition must be denied.

Respectfully submitted,

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